No. 90-203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARTHOLOMEW S. BERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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August 1990

QUESTIONS PRESENTED

I. Whether the military judge's ruling on the defense request for production of witnesses in support of the motion to suppress denied petitioner an opportunity to present a meaningful defense.

II. Whether the United States Court of Military Appeals erred, to the substantial detriment of the Petitioner, when it applied an overly broad standard for assessing harmless error.

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Bartholomew S. Berry, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on May 10, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on March 15, 1989 (Appendix A). The opinion of the United States Court of Military Appeals is reported at 30 M.J. 134 (C.M.A. 1990) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on May 10, 1990. The jurisdiction of this court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1985) and 10 U.S.C. § 867(h) (Supp. III 1985).

STATEMENT OF THE CASE

The petitioner, an Air Force enlisted member, was tried by general court-martial at Yokota Air Base, Japan on May 24 and 25, 1988. Contrary to his pleas, he was convicted of wrongfully using and distributing marijuana on divers occasions. The petitioner was sentenced to a bad conduct discharge, four months confinement, a fine of $4,000.00 and reduction to E-1, the lowest enlisted grade.

The Government's case rested upon the petitioner's confession to the offenses and the statements of two immunized co-actors. The defense moved to suppress the petitioner's confession because it had been coerced and was, therefore, involuntary. The defense presented in its case-in-chief two witnesses who testified to the petitioner's good character and a witness who had been present at one of the parties where marijuana allegedly had been used, but had not seen any indication of such use. In addition, the defense presented evidence of two negative urinalysis results taken during the period of the charged offenses. In rebutal, the prosecution offered into evidence a one page lab report of a third urinalysis test, which said the petitioner's urine had tested positive for marijuana metabolite.

The petitioner testified in support of the motion to suppress. He said that the law enforcement agents ignored his repeated statements that he had nothing to say to them, that they provided all the information and wrote his confession, and that they used threats to get him to sign it. The Government presented evidence from the two law enforcement agents who interviewed the petitioner which contradicted the petitioner's testimony. In rebuttal to the Government's witnesses, the defense attempted to call two witnesses. One witness was a former law enforcement agent. The other witness had been a suspect in the same investigation involving the petitioner. They would have corroborated the petitioner's testimony as to the techniques and procedures used by the law enforce-

ment agents in this case. The military judge improperly denied the petitioner an opportunity to present this evidence on relevance and bias grounds.

The Air Force Court of Military Review affirmed the petitioner's case in a short *per curiam* decision which did not address the issues herein. *United States v. Berry*, ACM 27064 (A.F.C.M.R. Mar. 15, 1989). The United States Court of Military Appeals granted review on whether the military judge erred in admitting the positive urinalyis evidence. The court found that the admission of this evidence constituted error; however, it also concluded the error was harmless. *United States v. Berry*, 30 M.J. at 135 and 136. The court declined to consider the matters raised in Issue I of this petition.

REASONS FOR GRANTING THE WRIT

I

The trial judge erred by preventing the defense from fully developing its motion to suppress by excluding the testimony of two witnesses. His ruling that the evidence was irrelevant was erroneous. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Mil.R.Evid. 401. The petitioner testified that the government's agents coerced his confession. The agents denied the specific allegations and testified as to their routine practices in interviewing suspects.

The former agent's testimony would have been relevant to rebut the agents' statements as to their organization's normal practice and procedures. It would have been relevant and admissible under Mil.R.Evid. 406 as evidence of a routine practice of an organization. *See generally, Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Loughan v. Firestone Tire and Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985); *Keltner v. Ford Motor Co.*, 748 F.2d 1265 (8th Cir. 1984).

In addition, the other suspect's testimony was relevant to rebut the government agents' testimony on their routine practices in interviewing suspects. The same lead agent who spoke to the petitioner interviewed the other suspect. Since both interviews occurred in the same general timeframe and concerned the same drug investigation, there was a sufficient nexus between the two interviews to make the common techniques employed relevant to the judge's determination of the credibility of the petitioner and the agents. *See United States v. Strong*, 17 M.J. 263 (C.M.A. 1984).

The trial judge's second basis for excluding evidence, that any witness called by the defense on this issue must not have a motive to lie, was also erroneous. Such a requirement placed an impossible burden upon the defense. Clearly only individuals who had been interviewed as suspects would have knowledge of the techniques employed by these agents. But, since they were the subjects of the investigation, they would all have a motive to lie to protect themselves. Thus, the military judge would not permit them to testify.

II

The United States Court of Military Appeals erred in applying the harmless error doctrine to the erroneous admission of the positive urinalysis test. That is, the court extended the range of consideration beyond the parameters of well-settled law.

The United States Court of Military Appeals assessed this error on the basis of the strength of the government's case and the weakness of the petitioner's case following the analysis it announced in *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985). *Weeks* was a case wherein character evidence was improperly excluded. The court fashioned a "four pronged analysis" to test for prejudice. *Id.* at 25. The court has usually applied this analysis in cases where character evidence has been improperly excluded. *United States v. Wilson*, 28 M.J. 48, 50-51

(C.M.A. 1989); *United States v. Bennedict*, 27 M.J. 253, 262 (C.M.A. 1988). However, the court has also used the test when assessing harmless error in cases that do not involved issues of character evidence. *United States v. Brooks*, 26 M.J. 28, 29 (C.M.A. 1989); *United States v. Arruza*, 26 M.J. 234, 238 (C.M.A. 1988). Interestingly, the Court of Military Appeals has adopted the standard that this Court established in *Kotteakos v. United States*, 328 U.S. 750 (1946). *United States v. Barnes*, 8 M.J. 115, 117 (C.M.A. 1979).

In *Kotteakos v. United States*, 328 U.S. at 754-765, this Court described the harmless error doctrine in the following manner:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The *Kotteakos* standard focuses on the "manner" in which the error "influences" a jury. *United States v. Ruffin*, 575 F.2d 346, 359 (2d Cir. 1978). Hence, the analysis is not based on the presence of independent evidence which is otherwise sufficient to establish guilt. *United States v. Ruffin*, 575 F.2d at 358-359. In contrast, the *Weeks* analysis ignores "manner" considerations. It addresses the following: The strength of the Government's case; the quality of the defense theory; and matters that pertain exclusively to character evidence.

United States v. Weeks, 20 M.J. at 25. Clearly, the *Weeks* analysis is not the equivalent of the standard established in *Kotteakos*.

In petitioner's case, the Court of Military Appeals found no harm per the *Weeks* analysis. The court never addressed the "manner" of the error. Instead, it looked at the overall strength of the Government's case and the overall theory of the defense case.

CONCLUSION

The military judge prevented the petitioner from fully developing his motion to suppress based upon police misconduct. The petitioner should have been permitted to rebut the evidence offered by the Government regarding its agents' habits and routine practices in interviewing suspects. Thus, the petitioner has been denied an opportunity to present a meaningful defense. In addition, The Court of Military Appeals relied upon a flawed standard for assessing harmless error. As a result, the petitioner has been denied meaningful appellate review. Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1990

APPENDIX

APPENDIX

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

SERGEANT BARTHOLOMEW S. BERRY, FR 097-62-2994
UNITED STATES AIR FORCE

ACM 27064

[15 MAR 1989]

Sentence adjudged 25 May 1988 by GCM convened at Yokota Air Base, Japan. Military Judge: Lemuel R. Waitman (sitting alone).

Approved Sentence: Bad conduct discharge, confinement for four (4) months, a fine of four thousand dollars ($4,000.00) and to be further confined if the fine is not paid, but not to exceed one additional year and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Mark R. Bell. Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Carole W. Hanson and Major Terry M. Petrie.

Before

HODGSON, HOLTE and PRATT
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the accused was committed. As to the assigned error: *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Emerson*, 12 M.J. 513 (N.M.C.M.R. 1981); *United States v. Lemarlie*, 11 M.J. 864 (N.M.C.M.R. 1981); *United States v. Gonzalez-Rodriquez*, 7 M.J. 633 (A.C.M.R. 1979); *United States v. Mackey*, 7 M.J. 649 (A.C.M.R. 1979); *United States v. Briers*, 7 M.J. 776 (A.C.M.R. 1979). As to 1st Invited Issue: *United States v. Gillette*, 22 M.J. 84 (A.F.C.M.R. 1986); *United States v. Forbes*, 19 M.J. 953 (A.F.C.M.R. 1985). As to the 2nd Invited Issue: *United States v. Villines*, 13 M.J. 46 (C.M.A. 1982); *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976); R.C.M. 703(b)(1)(f)(1). Accordingly, the findings of guilty and sentence are

AFFIRMED.

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

U.S. COURT OF MILITARY APPEALS

No. 62,655

UNITED STATES,

Appellee,

v.

BARTHOLOMEW S. BERRY, Sergeant, U.S. Air Force,

Appellant.

May 10, 1990

For Appellant: *Captain Bernard E. Doyle, Jr.* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Captain Morris D. Davis* (argued); *Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Paul H. Backwell* (on brief); *Major Terry M. Petrie.*

Opinion of the Court

EVERETT, Chief Judge:

A military judge sitting alone as a general court-trial tried Sergeant Berry at Yokota Air Base, Japan, on a charge with two specifications alleging violations of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The first specification accused him of divers uses of marijuana between January 1 and December 31, 1987; and the second specification alleged divers distributions of marijuana between June 1 and December 31, 1987. Contrary to his pleas, appellant was found guilty as charged and was sentenced to a bad-conduct discharge, 4 months' confinement, reduction to airman basic, and

a fine of $4,000.00, with further confinement of an additional year if the fine was not paid. The convening authority approved the sentence; and the Court of Military Review affirmed the findings and sentence in a memorandum opinion.

We granted Berry's petition for review on this issue:

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE OF APPELLANT'S POSITIVE URINALYSIS IN REBUTTAL.

I

The Government's case-in-chief relied heavily on Berry's written confesesion taken on January 3, 1988, by special agents of the Air Force Office of Special Investigations. In this confession—which the defense moved unsuccessfully to suppress—appellant had admitted using marijuana a number of times during the year 1987 and also distributing marijuana to Staff Sergeant Steven Ladnyk on seven occasions. The Government also offered corroborating testimony from two immunized co-actors, Sergeant Ladnyk and Airman Basic Jerry Smitherman.

The defense presented evidence of appellant's good character and of Ladnyk's poor character for truthfulness, as well as the testimony of a witness who had been present at a party where the Government claimed that Berry had smoked marijuana but who had not seen any use of marijuana there. Also, Captain Linda Rollins, the monitor of the medical urinalysis testing program at Yokota Air Base, testified that on November 17, 1987, and January 4, 1988, Berry had provided urine specimens, both of which had been tested and reported as negative.

In rebuttal, the Government offered a document which purported to be a laboratory report prepared by the United States Army Criminal Investigation Laboratory-

Pacific on January 22, 1988.[1] The report stated the "suspect" was Bartholomew BERRY; listed under evidence examined—"[o]ne urine specimen (Berry)"; and set forth these findings: "Examinations of Exhibit 1 revealed the presence of 11-nor-Delta 9-THC acid, the major human metabolite of THC."[2] *(See* Appendix.) The report does not give the date when the urine specimen was obtained; and it was not accompanied by any document showing a chain of custody. However, there was an authenticating certificate, signed by Sergeant Robert A. Vergara, Records Custodian, on the stationery of the Criminal Investigation Laboratory-Pacific, which stated "that the attached report . . . is a true and accurate copy of a report kept in the official files of this laboratory and maintained by me in accordance with applicable law and regulations."

The defense objected "on the grounds that it was improperly obtained. There's been no foundation laid for a chain of custody. There's been no foundation laid that it was collected in any sort of regular manner." Trial counsel responded that, under Mil.R.Evid. 902(4a), Manual for Courts-Martial, United States, 1984, the report was admissible; and the military judge accepted this argument and overruled the defense objection.

II

A

The authenticating certificate properly attested that the document attached to it was a copy of a report on file at the Criminal Investigation Laboratory. *See* Mil.R. Evid. 902(4a). However, it did not attest that the urine specimen discussed in the report actually had been obtained from Berry. The chemists who prepared the labo-

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[1] The exhibit reflects that the findings of the two chemists who apparently prepared the report are dated January 21, 1988.

[2] *See United States v. Harper*, 22 MJ 157, 159 n. 1 (CMA 1986).

ratory report could not have known any of the circumstances under which the urine specimen had been obtained and transmitted to the criminal laboratory. Therefore, their report should not be construed to contain any representation as to the chain of custody; and, if such representations had been made, they would be beyond the knowledge of those who prepared the report.

Appellate government counsel argue that the two laboratory reports introduced as defense exhibits, which state that Berry's urine had tested negative on two occasions, were equally objectionable for failure to establish a chain of custody and that, by introducing these reports, the defense waived its right to object to the laboratory report the Government offered in rebuttal. We disagree.

The Government did not object to the two defense exhibits on chain-of-custody grounds, as did the defense with respect to the Government's laboratory report. *See* Mil.R.Evid. 103(a)(1). Moreover, the defense offered a witness to help link its reports with appellant's urine samples; but the Government offered only a document without any supporting witness. Under the circumstances here, the defense did not waive its right to object to the Government's failure to establish a chain of custody. Thus, the document was not admissible.

Although we hold the Government's laboratory report inadmissible because of an inadequate foundation, we should also point out some other concerns. The report gives no indication of the methodology or rationale used in arriving at its conclusion concerning the presence of THC. Moreover, no witness was called to explain the procedures of the laboratory in preparing such reports or to interpret the report. *Cf. United States v. Murphy*, 23 MJ 310 (CMA 1987). Moreover, without more information than was furnished by this laboratory report, it is impossible to determine whether the report was prepared in the manner prescribed by the directives of the Department of Defense. *Cf. United States v. Arguello*, 29 MJ

198 (CMA 1989). Even if a chain of custody had been established, we doubt that this document—without any supporting witness—would have been sufficiently probative to warrant its reception as rebuttal evidence.

B

Even though the rebuttal evidence was inadmissible, we conclude that Berry was not harmed. The prosecution case was strong and included a detailed confession by Berry, which dovetailed with the corroborating testimony of two prosecution eyewitnesses. *See United States v. Rounds*, 30 M.J. 76 (CMA 1990). The defense case, on the other hand, was weak. Since we are convinced beyond a reasonable doubt that reception of the laboratory report did not affect the outcome of the trial, there is no need to set aside the findings of guilty.

III

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and SULLIVAN concur.

APPENDIX

CRIMINAL INVESTIGATION LABORATORY REPORT
CID Regulation 195-20

Date Prepared
22 January 1988

Page 1 of 1 pages

Laboratory Case Number
88-CID331-00015-C

Contributor Case Number
8846D17-2201

Preparing Laboratory

United States Army Criminal
Investigation Laboratory—Pacific
APO San Francisco 96343-0086

Contributor

Commander
AFOSI Detachment 4640/CC
APO 96328

Suspect(s)

BERRY, BARTHOLOWMEW

Evidence Examined

EXHIBIT:

1—One urine specimen (BERRY).

FINDINGS:

Examinations of Exhibit 1 revealed the presence of 11-nor-Delta 9-THC acid, the major human metabolite of THC.

Note: 11-nor-Delta 9-THC acid is controlled by Schedule I of Public Law 9L-513.

CONSUMPTION OF EVIDENCE:

EXHIBIT	RECEIVED
1	item
CONSUMED	RETURNED
extract	item

/s/ George R. Nakamura
GEORGE R. MAKAMURA
Chief Chemist
21 January 1988

/s/ J. Stall
J. STALL
Forensic Chemist
21 January 1988

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